UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TECHNICA LLC, Employer, and PEDRO CANO, an employee Petitioner INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351 Union	CASE NO. 28-RD-218554 (blocked by 28-CA-212478)

PETITIONER'S REQUEST FOR REVIEW OF ORDER DISMISSING DECERTIFICATION PETITION

INTRODUCTION

Petitioner Pedro Cano ("Petitioner" or "Cano") is employed by Technica LLC ("Employer" or "Technica") and is in a bargaining unit currently exclusively represented by the International Union of Operating Engineers Local 351 ("union" or "Local 351"). On 16 April 2018, Cano attempted, pursuant to Section 9 of the National Labor Relations Act ("the Act" or "NLRA"), 29 U.S.C. § 159, to rid himself of an unwanted union by filing a decertification petition ("the Petition") supported by a clear majority of bargaining-unit employees. On 26 April 2018, fewer than twenty-four (24) hours before a scheduled hearing on the Petition, Regional Director for Region 28 Cornele A. Overstreet stopped the decertification process based upon Technica's obligation to bargain with Local 351 "for a reasonable period of time pursuant to the terms of an informal settlement agreement [to which the employees were not privy] entered into prior to the filing of the decertification petition." Order Vacating Hearing and Dismissing Decertification Petition dated 26 April 2018 (Exhibit A hereto).

The Regional Director's decision should be overruled for two reasons. First, the Regional Director misapprehends existing Board precedent, confusing a rule against an employer's decision to honor a decertification petition demonstrating majority support for decertification in the wake of a Board settlement of a refusal-to-bargain charge with an employee initiated and pursued decertification petition.

Moreover, even to the extent that existing Board law may be interpreted to require dismissal of the Petition, pursuant to Board Rules and Regulations §§ 102.67 and 102.71, Cano submits this Request for Review of the dismissal of election proceedings based on his decertification petition because it raises "compelling reasons for reconsideration of [a] . . . Board rule or policy." Rules & Regulations § 102.71(a)(1), (2). The current rule effectively stops decertification elections upon an unadjudicated, unproven, and unadmitted unfair labor practice charge, which is contrary to the purposes of the Board and the Act. The Board exists to *conduct* elections and thereby vindicate employees' right under the Act to choose or reject union representation, not to arbitrarily suspend election petitions at the unilateral behest of unions who fear an election loss. *Cf. General Shoe Corp.*, 77 NLRB 124, 126 (1948) (holding that the Board should exercise the power to set aside an election "sparingly" in representation cases because it cannot "police the details surrounding every election" and the secrecy in Board elections empowers employees to express their true convictions). The policy applied by the Regional Director inequitably denies employees their fundamental rights under NLRA Sections 7 and 9 without any determination or admission that any unfair labor practices have ever occurred. The Board should put to an end to this inequitable practice.

Petitioner asks the Board to: grant his Request for Review; reactivate his decertification election petition; and overrule, nullify, substantially revise, or clarify a policy which frustrates

employee free choice in the absence of any showing or admission of employer wrongdoing. Such action by this Board will restore protection for employees' right to choose or reject unionization at a time they choose by preventing Regional Directors to presume too much from an employer's settlement of a refusal-to-bargain charge without an admission of wrongdoing, preventing unions from clinging to power despite actual evidence of their loss of employee support.

FACTS OF THE CASE

On 4 January 2018, Local 351 filed an unfair labor practice charge against Technica (Case No. 28-CA-212478), alleging that Technica had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), by failing to bargain in good faith with Local 351. Local 351 alleged that Technica had promoted Unit employees into supervisory positions and changed the job positions and labor categories of Unit employees, without prior notice to the union and without affording the union an opportunity to bargain. On 29 March 2018, Technica and Local 351 entered into an informal settlement agreement (Agreement), which was approved by the Regional Director on 30 March 2018. Under the terms of the Agreement, Technica agreed to: (1) upon request, bargain in good faith with Local 351 as the exclusive collective-bargaining representative of Unit employees, including bargaining with Local 351 over the promotion of employees with the Unit and the effects of Unit employees being promoted into supervisory positions; and (2) restore the terms and conditions of employment that were in effect before Technica unilaterally promoted employees within the Unit or changed their labor categories. Petitioner is informed that the Agreement contains a non-admissions clause regarding the behavior alleged to be in violation of the Act.

Citing the Board's decision in *Poole Foundry and Machine Co.*, 95 NLRB 34, 36 (1951), *enf'd* 192 F.2d 740 (4TH CIR. 1951), the Regional Director concluded that Technica "was under an obligation to honor that agreement for a reasonable time after its execution without questioning the representative status of" Local 351. *Id.* The Regional Director also cited *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 399 (2001), for the proposition that "a reasonable time for bargaining before the union's majority status can be challenged will be no less than 6 months, but no more than 1 year," and that the "reasonable period" begins when the offending employer commences bargaining in good faith. Exhibit A at 3.

But this logic is flawed in its premises and its conclusion. First, there is utterly no indication that Technica failed to "honor that agreement." Technica has apparently continued to bargain with Local 351, and apparently did not refuse to bargain even when presented with a petition signed by a majority of bargaining-unit employees. Furthermore, Technica did not "question[] the representative status of the [u]nion," *Poole Foundry*, 95 NLRB at 36; Technica's **employees** challenged the representative status of Local 531, and did so overwhelmingly. Finally, as discussed in the reasoning of *Truserv Corp.*, 349 NLRB 227, 230 (2007), insofar as — Petitioner is informed — the informal settlement agreement entered into by Technica contains a non-admissions clause. This case is therefore a paradigm example where enforcement of the policy of *Poole Foundry* would be unjustified, and unjust.

This dismissal is entirely without merit, yet Technica's and Local 351's informal agreement was sufficient for the Regional Director to short-circuit a valid decertification proceeding supported by a majority of Technica employees without a hearing or even a threshold determination of the legitimacy of the prior unfair labor practice charge, and contrary to the very precedent that he cites for limited purposes in his Order. *Truserv Corp.*, *supra*.

ARGUMENT

I. The Regional Direct Misinterprets *Truserv*

Employees enjoy a statutory *right* to petition for a decertification election under Section 9(c)(1)(A)(ii) of the Act, 29 U.S.C. § 159(c)(1)(A)(ii), and that right should not be trampled by arbitrary rules, "bars," or "blocking charges" that prevent or frustrate the expression of true employee free choice. Employee free choice under Section 7 is the paramount interest of the Act. *See Pattern Makers League v. NLRB*, 473 U.S. 95, 104 (1985); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. CIR. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act") (quotation marks and citation omitted). A Board-conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 725-26 (2001). Industrial stability is enhanced when employees vote in secret-ballot elections, since they ensure that employees actually support the workplace representative empowered to speak exclusively for them. Yet, the rule (mis)applied here sacrifices this right of *employee* free choice.

Even so, the Board's rule requiring dismissal of decertification petitions filed in close proximity to settlement of refusal-to-bargain charges is not so broad as the Regional Director seems to believe. Indeed, the Regional Director's carefully-selected quotation from *Truserv* misses the proverbial forest for the trees. Thus, while the Regional Director cites the Board's "In sum..." sentence in *Truserv Corp.*, 349 NLRB at 230, he ignores that the Board in that case *reversed* the Regional Director's dismissal of the petition, *id.* at 228, noting that — in a settlement of refusal-to-bargain charges in an agreement with a non-admissions cause — there is no determination, admission, or adjudication of conduct sufficient to taint the petition, and the

petition should be processed. *Id.* at 231. If there is no unlawful conduct admitted or adjudicated, there is no proven conduct tainting the petition.

This is not a case, like *Poole Foundry* or *Lee Lumber*, where a settlement resolves refusal-to-bargain charges where an employer has made admissions of wrongdoing. As noted in *Truserv*:

> Employers often agree to settle alleged unfair labor practices for a variety of economic and practical considerations despite their belief that they have engaged in no unlawful conduct. For example, employers may wish to settle simply to avoid costly and time-consuming litigation. If a settlement will result in the processing of the decertification petition, we do not see how that would discourage the employer from settling. On the other hand, if the employer does not settle, and if the Board finds unlawful conduct, that will likely result in the dismissal of the decertification petition.

349 NLRB at 231. This is likely one of those conditions, particularly in light of the existence of a non-admissions clause in the relevant settlement agreement.[1]

The Regional Director's reflexive misapplication of *Poole Foundry* disregards the fact that Petitioner and his fellow bargaining unit members may wish to be free from union representation, irrespective of any alleged Employer infractions. Yet, the Regional Director treats Petitioner and his fellow like children who cannot possibly make up their own minds. This is wrong. Even assuming, *arguendo*, Technica actually committed the violations alleged in the unfair labor practices charge, "[t]he wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees." *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (2001) (Member Hurtgen, dissenting); *see also Cablevision*

---

[1] Given the serious impingement on employees' Section 7 rights which results from a settlement without a non-admissions clause, or where the employer confesses wrongdoing, serious questions might be raised about application of such a rule in *any* circumstances, given that employees disaffected from the union have no voice in the proceedings. Where there has been neither an admission nor adjudication of employer wrongdoing, even the fig leaf of a presumption of causation of employee disaffection is nonexistent.

Systems Corp., Case 29-RD-138839 (June 30, 2016) (Order Denying Review) (Member Miscimarra, dissenting).

Indeed, the Board's policies often deny decertification elections even where the employees are not aware of the alleged employer misconduct, and where their disaffection from the union springs from wholly independent sources, *i.e.*, the union itself. Use of "presumptions" to halt decertification elections serves only to entrench unpopular but incumbent unions, thereby forcing an unwanted representative onto employees. Judge Sentelle's concurrence in *Lee Lumber* specifically highlights the inequitable nature of the Board's policies. 117 F.3d at 1463-64.

II. The Dismissal of the Petition Impinges on the Fundamental Rights of Employees.

While this case does not present a classic "blocking charge," the *Master Slack Corporation*, 271 NLRB 78 (1984), factors compel a determination that the settlement of the charge in Case No. 28-CA-212478 should not block an election. *Master Slack* requires an analysis of several factors including: "[1] the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; [2] any possible tendency to cause employee disaffection from the union; and [3] the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union." *Id.* at 84 (citing *Olson Bodies, Inc.*, 206 NLRB 779 (1973)).

The charge in Case No. 28-CA-212478 does not allege unilateral changes that are essential terms and conditions of employment. The types of violations that cause dissatisfaction "are those involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation." *Tenneco Auto, Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013) (finding employer's refusal to provide union addresses of replacement employees,

requirement that employees obtain company permission before posting materials, and discipline of union advocate did not taint petition); *see also Goya Foods of Fl.*, 347 NLRB 1118, 1122 (2006) (finding that hallmark violations are those "issues that lead employees to seek union representation").

Here, the only allegations are that the employer provided benefits to employees for which Local 351 could not claim credit. This is hardly sufficient to smother the rights of Cano and the clear majority of his fellow employees to determine whether they wish to be represented by Local 351 for an undetermined amount of time. Technica is not even alleged to have interfered in the decertification process.

Thus, Region 28 should be ordered to proceed to an immediate election without further delay. Petitioner and his colleagues are not sheep, operating with some "false consciousness,"[2] but are responsible, free-thinking individuals who should be able to make their own choice about unionization. The employees' paramount Section 7 rights are at stake, and their rights should not be so cavalierly discarded simply because Technica agreed — without admitting wrongdoing — to settle a refusal-to-bargain charge by agreeing to do what it was legally obliged to do in any case. Petitioner urges the Board to overrule or clarify that *Poole Foundry* and its progeny do not require dismissal of decertification petitions where no wrongdoing is either proven or admitted, in order to protect the true touchstone of the Act—*employees*' paramount right of free choice under Section 7. *Int'l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961) (holding that "there could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter representation); *see also Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004).

---

[2] A phrase and concept attributed to Friedrich Engels. Eagleton, Terry, *Ideology: An Introduction*, London: Verso (1991), p. 89.

CONCLUSION

The Board should grant the Request for Review and order the Regional Director to promptly process this decertification petition.

DATED: 10 May 2018

Respectfully submitted,

/s/ W. James Young

W. JAMES YOUNG, Esq.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
TELEPHONE — (703) 321-8510
FACSIMILE — (703) 321-9319
E-MAIL — wjy@nrtw.org

ATTORNEY FOR PETITIONER

E:\SanDiskSecureAccessV2.0\Cano\Appeal.wpd
Thursday, 10 May 2018, 9:26:15 AM

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITIONER'S REQUEST FOR REVIEW OF ORDER DISMISSING DECERTIFICATION PETITION** was filed electronically with the Executive Secretary using the NLRB's e-filing system, and copies were sent to the following parties *via* e-mail, as follows:

Kenneth B. Siepman
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
111 Monument Circle, Suite 4600
Indianapolis, Indiana 46204
kenneth.siepman@ogletree.com

Christian Zayas, Secretary to the Assistant Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004-3099
Christian.Zayas@nlrb.gov

juand351@yahoo.com

this 10th day of May, 2018.

/s/ W. James Young

W. JAMES YOUNG